Supreme Court, U.S.
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No. 89-836

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

RICHARD P. CRANE, JR., CHARLES R. ADKISSON, JEFF D. MCCOLL, JR., JACK STAFFORD, VINCENT M. HELM, JOE HAY, TRUSTEES OF SOUTHERN NEVADA CULINARY AND BARTENDERS PENSION TRUST,
Petitioners,

VS.

CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, d/b/a CONTINENTAL TELEPHONE COMPANY OF NEVADA,
Respondent.

On a Petition for Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

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21 pp

QUESTION PRESENTED FOR REVIEW

Whether the Pension Trust was required to adhere to the Nevada statutory procedure for judicial review of an adverse administrative determination of the Nevada Public Service Commission.

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No. 89-836

In the Supreme Court

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RICHARD P. CRANE, JR., CHARLES R. ADKISSON, JEFF D. McCOLL, JR., JACK STAFFORD, VINCENT M. HELM, JOE HAY, TRUSTEES OF SOUTHERN NEVADA CULINARY AND BARTENDERS PENSION TRUST,
Petitioners,

vs.

CONTINENTAL TELEPHONE COMPANY OF CALIFORNIA, d/b/a CONTINENTAL TELEPHONE COMPANY OF NEVADA,
Respondent.

On a Petition for Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

Respondent for the reasons set forth herein, respectfully requests that this Honorable Court deny Petitioner's Petition for Certiorari.

STATEMENT OF THE CASE

On March 19, 1979, Petitioner, the Southern Nevada Culinary and Bartenders Pension Trust (hereinafter "the Pension Trust"), and Respondent, Continental Telephone Company of California, dba Continental Telephone Company of Nevada (hereinafter "Continental"), entered into two separate service and tariff agreements whereby Continental agreed to install underground telephone cables in certain subdivisions located in Gardnerville, Nevada. The Pension Trust owns the subdivisions. Continental is

a public utility as defined in Nevada Revised Statutes (hereinafter "Nev. Rev. Stat.") § 704.020, providing telephone service to the public in its service area. The Nevada Public Service Commission (hereinafter the "Commission"), supervises and regulates Continental pursuant to Nev. Rev. Stat. §§ 703.150 and 704.210.

Because such service and tariff agreements are subject to regulation by the Commission, pursuant to Nev. Rev. Stat. § 704.070, the agreements were submitted to the Commission for review and approval. The agreements specifically provided that Continental was to perform the installations pursuant to Commission approved rules and regulations governing the installation of underground telephone cables, and that the agreements would be submitted to the Commission for its approval. The parties further agreed that the service and tariff agreements were subject to any changes or modifications that the Commission might on occasion direct in the exercise of its jurisdiction. The Commission was a signatory to the tariff agreements.

Subsequently, disputes arose between the parties regarding the proper calculation of ownership costs and refunds under the agreements. Unable to resolve these issues to its satisfaction, the Pension Trust, in accordance with the provisions of Nev. Rev. Stat. § 703.310 and Nevada Administrative Code (hereinafter "Nev. Admin. Code") § 703.621, filed a written consumer complaint with the Commission by letter dated May 21, 1985. The Pension Trust's complaint raised the following claims against Continental based upon the Pension Trust's interpretation of the service and tariff agreements:

(1) That ownership costs accrue at a later date than that claimed by Continental;

(2) That the ownership costs should be calculated only with reference to the refundable portion of the advance;

(3) That ownership costs for which the Pension Trust is responsible should decrease over time; and

(4) That refunds due the Pension Trust under the terms of the service and tariff agreements were improperly offset against

ownership costs due Continental under the terms of the agreements.

Pursuant to Nev. Rev. Stat. § 703.310, Continental and the Pension Trust sought the Commission's interpretation of the terms of the service and tariff agreements. Pursuant to Nev. Rev. Stat. § 703.310 and Nev. Admin. Code § 703.621 *et seq.*, the Commission referred the Pension Trust's complaint to its Director of Consumer Relations for investigation. In accordance with Nev. Rev. Stat. § 703.310 and Nev. Admin. Code § 703.621, Continental responded to the Complaint and described to the Commission how it had implemented the service and tariff agreements. After Continental and the Pension Trust submitted their respective interpretations of the agreements, the Commission's Consumer Division, after investigation, concluded that the Pension Trust claims lacked merit.

Dissatisfied with the Consumer Division's determination, the Pension Trust requested that the Commission undertake a further review and disposition pursuant to Nev. Rev. Stat. § 703.310(2) and Nev. Admin. Code § 703.636. At a Commission agenda meeting held on November 25, 1985, the Commission determined that there had been no violation of the service and tariff agreements by Continental, and, on that basis, and in accordance with Nev. Admin. Code § 703.641, dismissed the Pension Trust's complaint for lack of probable cause. (Appendix, Pg. 2) The Commission issued its Order Dismissing Complaint on December 17, 1985, and the Order was signed by all five Commissioners and attested to by the Secretary of the Commission.

Nev. Rev. Stat. § 703.373 provides a procedure for judicial review of final decisions by the Commission. Under Nev. Rev. Stat. § 703.373(2), a party must file a petition for judicial review in the proper district court within ninety (90) days after service of the Commission's final decision or, if a rehearing is held, within thirty (30) days after the decision thereon. Pursuant to Nev. Rev. Stat. § 703.373(6), the court may affirm the decision of the Commission or set it aside.

The Pension Trust did not seek judicial review of the Commission's decision within ninety (90) days in accordance with the

provisions of Nev. Rev. Stat. § 703.373. Instead, on June 25, 1986, more than six (6) months after the Commission issued its Order Dismissing Complaint, the Pension Trust filed an independent action in the Ninth Judicial District Court of Nevada, asserting the same claims against Continental as were previously rejected by the Commission. In an order filed on April 4, 1988, the district court held that the Pension Trust had failed to satisfy the procedural and time requirements of Nev. Rev. Stat. § 703.373, and dismissed the Pension Trust's complaint with prejudice. (Appendix Pg. 4)

The Pension Trust appealed the district court's order to the Nevada Supreme Court. On June 30, 1989, after both parties submitted briefs and oral arguments, the Nevada Supreme Court issued an opinion affirming the district court's decision. (Appendix Pg. 5) The court observed that instead of filing a petition for judicial review of the Commission's order, the Pension Trust improperly filed a new complaint. Because the Pension Trust did not avail itself of Nevada's specific legislative procedure for review of Commission decisions, and because the ninety (90) day time limit for filing a petition for judicial review is jurisdictional, the court declared that the district court lacked jurisdiction and had properly dismissed the Pension Trust's complaint.

The Nevada Supreme Court denied a rehearing on August 22, 1989. (Appendix, Pg. 9)

ARGUMENT

The Pension Trust was required to adhere to the Nevada statutory procedure for judicial review of an adverse administrative determination of the Nevada Public Service Commission.

The Commission has full power to regulate the rates, services and practices of public utilities in the state of Nevada. *So. Nev. Tel. Co. v. Christoffersen*, 77 Nev. 322, 326, 363 P.2d 96, 97 (1961). Continental is bound by any order of the Commission and a final order issued by the Commission is deemed just and reasonable until set aside by a court. Nev. Rev. Stat. § 703.374(2) (1983). Thus, once the Commission made its determination that Continental properly complied with the terms

of the service and tariff agreements, Continental was bound to adhere to that determination, until, or unless, a court of competent jurisdiction ordered a different disposition. Rather than bringing a de novo complaint against Continental, the Pension Trust could have sought judicial review against the Commission Nev. Rev. Stat. § 703.373 (1983). However, the Pension Trust failed to seek judicial review.

The Commission's Order Dismissing the Pension Trust's Complaint was a judicially reviewable order of the Commission pursuant to Nev. Rev. Stat. § 703.373. *See Gray Line Tours v. District Court*, 99 Nev. 124, 126, 659 P.2d 304, 305 (1983). Thus, the Pension Trust had the right to seek judicial review of the Commission's order, if the Pension Trust believed that the Commission erred. Had the Pension Trust filed a timely petition for judicial review, the Nevada courts could have properly addressed the due process concerns now raised by the Pension Trust in its Petition for Certiorari.

Nev. Rev. Stat. § 703.373 provides that any party of record to a proceeding before the Commission is entitled to judicial review of the Commission's final decision. The petitioner must commence the action within ninety (90) days after service of the Commission's final decision. Any action not commenced within ninety (90) days of entry of the Commission's order is time barred. *Mirin v. Checker, Inc.*, 85 Nev. 569, 570, 459 P.2d 774, 775 (1969); *Mirin v. Ace Cab Co.*, 85 Nev. 690, 691-692, 462 P.2d 523 (1969). Accordingly, in the instant case, because the Pension Trust did not timely seek judicial review of the Commission's Order Dismissing Complaint, further judicial review of the Commission's decision is unavailable.

Generally, courts have no inherent appellate jurisdiction over official acts of administrative agencies except when the legislature creates a statutory provision for judicial review. *Lakeview Village, Inc. v. Bd. of Cty. Com'rs*, 659 P.2d 187, 192 (Kan. 1983). Under Nevada law, when a statute concerning a particular subject provides a tribunal for the determination of questions relating to that subject, the jurisdiction thereby conferred is exclusive, unless otherwise expressed or clearly manifested. *Caruso v. Nev. Emp. Sec. Dep't.*, 103 Nev. 75, 76, 734 P.2d 224, 225 (1987). The

Nevada legislature, by explicit language, directed all parties who dispute decisions of the Commission to file petitions for judicial review in the appropriate court within ninety (90) days following the service of the Commission's final decision. Nev. Rev. Stat. § 703.373 (1983). Because the Nevada legislature created a specific procedure for review of Commission decisions, such procedure is controlling. *See Aleutian Homes v. Fischer*, 418 P.2d 769, 773 (Alaska 1966). Although the consequences of a legislative mandate may occasionally be harsh, courts should not substitute their judgment for that of the legislature. *Caruso*, 103 Nev. at 76, 734 P.2d at 225.

In its Petition, the Pension Trust argues that the Nevada courts should have analyzed whether or not the parties were provided an adequate opportunity to litigate the issues before the Commission.[1] This argument ignores the fact that the Pension Trust failed to avail itself of the judicial review procedure set forth in Nev. Rev. Stat. § 703.373. Under these circumstances, the district court and the Nevada Supreme Court properly refused to exercise jurisdiction over the Pension Trust's complaint.

In accordance with Title 28 U.S.C. § 1257, final judgments or decrees rendered by the highest court of a state are subject to review by the Supreme Court when the dispute before the state court involves a federal question. However, as explained by Justice Brennan:

> Crucial to the exercise of our certiorari jurisdiction is whether the controlling issue in the state court case is a federal issue, that is, an issue arising under the United States

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[1] In its Petition for Certiorari, the Pension Trust incorrectly asserts that the Nevada Supreme Court "overlooked" the fact that no evidentiary hearing concerning the dispute between the parties occurred. In its opinion affirming the lower court's decision, the Nevada Supreme Court observed that "[e]ven assuming arguendo that the [Commission] denied Pension Trust due process," the Pension Trust's contention that the Commission's procedure denied it due process was without merit because the Pension Trust failed to file a timely petition for judicial review. *Crane v. Continental Tel. Co. of Cal.*, 105 Nev. ____, 775 P.2d 705, 706 (1989).

> Constitution or under federal laws or treaties. But the fact that a federal question lurks in the case doesn't mean, standing alone, that a state decision will be reviewed. *First*, the federal question must be a substantial question. *Second*, the federal question must have been properly raised in the state courts. This is required because the state courts must first be afforded an opportunity to consider and decide the federal question. *Third*, even then we may not take the case if the state court's judgment can be sustained on an independent ground of state law.

Justice Brennan, *State Court Decisions and the Supreme Court*, 31 Penn. Bar Assn. Q. 393, 399-400 (1960).

In the case at hand, the question of whether the Pension Trust should have complied with the Nevada statutory procedure for judicial review of the Commission's decision is an issue of state, not federal law. Even assuming *arguendo* that a substantial federal question might have been present regarding the Pension Trust's due process rights, the Pension Trust failed to properly raise this issue in the Nevada courts. Accordingly, Continental respectfully requests that the United States Supreme Court deny the Pension Trust's Petition for Certiorari.

CONCLUSION

Respondent respectfully requests that this Court deny the Petition for Certiorari.

DATED this 12th day of December, 1989.

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of California, d/b/a
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of Nevada

(Appendices follow)

Appendix A

Before the Public Service Commission of Nevada

In Re Formal Complaint filed by
SOUTHERN NEVADA CULINARY & BARTENDER'S PENSION TRUST
against CONTINTENTAL TELEPHONE COMPANY
regarding refunds disputes.

Docket No. 85-1060

At a general session of the Public Service Commission of Nevada, held at its offices in Carson City, Nevada, November 25, 1985.

Present: Chairman Scott M. Craigie
Commissioner Fred Schmidt
Commissioner Thomas E. Stephens
Commissioner Stephen Wiel
Commissioner Jo Ann Kelly
Secretary William H. Vance

ORDER DISMISSING COMPLAINT

The Public Service Commission of Nevada ("Commission") makes the following findings.:

1. On May 22, 1985, Southern Nevada Culinary & Bartender's Pension Trust ("complainant") filed a complaint with the Commission against Contintental Telephone Company ("respondent") wherein complainant alleges, among other things, that respondent was improperly computing ownership costs and refunds pursuant to a special G.O. 9 contract approved by the Commission for Gardnerville Ranchos' units no. 6 and no. 7, a project which was financed by the Southern Nevada Culinary & Bartender's Pension Trust.

2. On June 28, 1985, respondent answered the complaint by letter, stating that it was in a position to provide all telephone service requested for units 6 and 7 as of October 31, 1980, which

is when it believed ownership costs began to accrue pursuant to the contract.

3. Following a discussion at a regularly scheduled agenda meeting on November 25, 1985, the Commission found that there was no probable cause for the complaint in that there has been no violation on the part of respondent of the terms of the contract.

4. The complaint should be dismissed for lack of probable cause. Therefore, based on the foregoing findings, it is hereby ORDERED that:

1. The complaint filed by Southern Nevada Culinary & Bartender's Pension Trust against Continental Telephone Company on May 22, 1985 is hereby DISMISSED.

2. The Commission retains jurisdiction for the purpose of correcting any errors which may have occurred in the drafting or issuance of this Order Dismissing Complaint.

By the Commission,

SCOTT M. CRAIGIE
Scott M. Craigie, Chairman

FRED SCHMIDT
Fred Schmidt, Commissioner

THOMAS E. STEPHENS
Thomas E. Stephens, Commissioner

STEPHEN WIEL
Stephen Wiel, Commissioner

JO ANN KELLY
Jo Ann Kelly, Commissioner

Attest:
WILLIAM H. VANCE
William H. Vance, Secretary
Dated: Carson City, Nevada
12/17/85
(SEAL)

Appendix B

Case No. 17076
Dept. No. 2

In the Ninth Judicial District Court of the State of Nevada
In and for the County of Douglas

Richard P. Crane, Jr., Charles R. Adkisson,
Jeff D. McColl, Jr., Jack Stafford, Vincent M. Helm,
Joe Jay, Trustees of the Southern Nevada Culinary
and Bartender Pension Trust,
Plaintiffs,

vs.

Continental Telephone Company of California,
dba Continental Telephone Company of Nevada,
Defendant.

Filed April 4, 1988

ORDER

Defendant has filed a Motion for Summary Judgment pursuant to N.R.C.P. 56. Oral argument was conducted on the 4th day of April, 1988.

A preliminary review of the file indicates that the issues raised in the Complaint herein were in fact brought before the Public Service Commission by Complaint filed with the Commission on May 22, 1985. The Complaint was dismissed by the Commission for lack of probable cause by Order entered December 17, 1985. See Exhibits A through C, attached to the Motion for Summary Judgment.

Plaintiff failed to file a Petition for Judicial Review within ninety (90) days of the Order of the Public Service Commission as required by N.R.S. 703.373. See infra. Instead, plaintiff filed an independent civil action with this Court on June 25, 1986.

N.R.S. 703.373 provides that the exclusive method of review for decisions of the Public Service Commission is by Petition for Judicial Review. N.R.S. 703.373(2) provides that a Petition for Judicial Review of a final decision of the Public Service Commission *must* be filed within ninety (90) days after service of the final decision of the Commission. The time requirements of N.R.S.

703.373(2) are mandatory. A District Court cannot consider a petition which is not timely filed. *Mirin v. Checker, Inc.*, 85 Nev. 569 (1969) (decision based on former similar statute).

Plaintiffs herein have filed [sic] to satisfy both the procedural requirements and the mandatory time requirements of N.R.S. 703.373. The complaint herein must be, and hereby is DISMISSED with prejudice. N.R.S. 703.373; *Mirin v. Checker, Inc.*, 85 Nev. 569 (1969).

In light of the above, the pending Motion for Summary Judgment is moot.

DATED this 4th day of April, 1988.

NORMAN C. ROBISON
NORMAN C. ROBISON
District Judge

Appendix C

In the Supreme Court of the State of Nevada

No. 19083

Richard P. Crane, Jr., Charles R. Adkisson, Jeff D. McColl, Jr., Jack Stafford, Vincent M. Helm, Joe Jay, Trustees of the Southern Nevada Culinary and Bartenders Pension Trust, Appellants,

vs.

Continental Telephone Company of California, dba Continental Telephone Company of Nevada, Respondent.

Filed June 30, 1989

Appeal from an order of the district court dismissing appellants' complaint with prejudice. Ninth Judicial District Court, Douglas County; Norman C. Robison, Judge.

Affirmed.

McDonald, Carano, Wilson, Bergin, Frankovich & Hicks and Timothy E. Rowe, Reno,
for Appellants.

Allison, MacKenzie, Hartman, Soumbeniotis & Russell, Carson City,
for Respondent.

OPINION

By the Court, MOWBRAY, J.:

This is an appeal from an order of the district court dismissing appellants' complaint with prejudice. Respondent Continental Telephone Company ("Continental") and the Southern Nevada Culinary and Bartenders Pension Trust's investment manager ("Pension Trust") entered into two contracts. Pursuant to these contracts, Continental agreed to install underground telephone cables at a development in Gardnerville. Subsequently, disputes arose between the parties regarding costs and refunds under the

contract. Pension Trust filed a written complaint with the Public Service Commission ("PSC") by letter dated May 21, 1985. The PSC's staff reviewed the complaint and found that Pension Trust's claims were meritless. Pension Trust appealed the decision to the PSC. The PSC heard the matter on November 25, 1985. On December 17, 1985, the PSC issued an order dismissing Pension Trust's complaint. The PSC concluded that no probable cause existed for the complaint because Continental had not violated the terms of the contracts. Rather than seeking judicial review of the PSC decision within ninety days pursuant to NRS 703.373,[1] Pension Trust filed a complaint in district court on June 25, 1986, more than six months after the PSC's order was filed. On October 19, 1987, Continental filed a motion for summary judgment. In an order filed April 4, 1988, the district court held that Pension Trust had failed to satisfy the procedural and time requirements of NRS 703.373, and dismissed Pension Trust's complaint with prejudice, concluding that Continental's motion for summary judgment was moot. This appeal followed.

Pension Trust contends that the district court erred by holding its complaint was barred by res judicata. This contention is meritless. The district court found it unnecessary to determine whether Pension Trust was barred by res judicata. The district court dismissed Pension Trust's complaint because Pension Trust failed to satisfy the procedural and time requirements of NRS 703.373.

Pension Trust contends that the procedure used by the PSC denied it due process. Even assuming arguendo that the PSC

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[1] NRS 703.373 provides, in relevant part:

1. Any party of record to a proceeding before the commission is entitled to judicial review of the final decision.

2. Proceedings for review may be instituted by filing a petition in the district court in and for Carson City, in and for the county in which the party resides, or in and for the county where the act on which the proceeding is based occurred. A petition must be filed within 90 days after the service of the final decision of the commission or, if a rehearing is held, within 30 days after the decision thereon. Copies of the petition must be served upon the commission and all other parties of record.

denied Pension Trust due process, this contention lacks merit. Pension Trust filed a complaint in the district court, rather than a timely petition for judicial review. Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the legislature has made some statutory provision for judicial review. *Lakeview Village, Inc. v. Bd. of Cty. Com'rs,* 659 P.2d 187 (Kan. 1983). NRS 703.373 specifies the procedure for seeking judicial review of a PSC order. It requires an aggrieved party to file a timely petition for judicial review. *See* NRS 703.373. When the legislature creates a specific procedure for review of administrative agency decisions, such procedure is controlling. *Aleutian Homes v. Fischer,* 418 P.2d 769 (Al. 1966). Instead of filing a petiton for judicial review of the PSC's order, Pension Trust filed a new complaint. Therefore, the district court lacked jurisdiction and properly dismissed Pension Trust's complaint. Furthermore, Pension Trust's complaint was untimely because it was filed on June 25, 1986, long after ninety days from the service of the PSC's order. Pension Trust's failure to file a petition for judicial review within ninety days of service of the PSC's order deprived the district court of jurisdiction. *See* NRS 703.373; *Mirin v. Checker Inc.*, 85 Nev. 569, 459 P.2d 774 (1969) (decision based on former similar statute); *Enriquez v. Merit System Council,* 589 P.2d 492 (Colo. 1979). "The time for taking an administrative appeal, as prescribed by statute, is jurisdictional and delay beyond the statutory time is fatal." *Lakeview Village, Inc.*, 659 P.2d 187, 193. Therefore, the district court did not err when it dismissed Pension Trust's complaint for want of jurisdiction.

Appellants' other contentions lacking merit, we hereby affirm the judgment of the district court.[2]

MOWBRAY, J.
Mowbray

We concur:
YOUNG, C.J.
Young

STEFFEN, J.
Steffen

SPRINGER, J.
Springer

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[2] The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.

Attest: A full, true and Correct Copy.
Clerk of the Supreme Court
By SHARON E. PAGE, Deputy

Appendix D

In the Supreme Court of the State of Nevada

Richard P. Crane, Jr., Charles R. Adkisson, Jeff D. McColl, Jr., Jack Stafford, Vincent M. Helm, Joe Jay, Trustees of the Southern Nevada Culinary and Bartenders Pension Trust, Appellants,

vs.

Continental Telephone Company of California, dba Continental Telephone Company of Nevada, Respondent.

Filed August 22, 1989

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

YOUNG, C.J.
Young

STEFFEN, J.
Steffen

SPRINGER, J.
Springer

MOWBRAY, J.
Mowbray

cc: Hon. Norman C. Robinson, District Judge
McDonald, Carano, Wilson, McCune, Bergin, Frankovich & Hicks
Allison, MacKenzie, Hartman, Soumbeniotis & Russell
Barbara Rice Reed, Clerk

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[1] The Honorable Robert E. Rose, Justice, did not participate in the decision of this appeal.